IN
GE

« HONOR « COURAGE « COMMITMENT «

MILITARY WHISTLEBLOWER RETALIATION (MWR)

TO RETALIATE OR NOT TO RETALIATE……

I HIRED MY UNEMPLOYED GOLF BUDDY TO CONSULT.
WHAT ARE HIS QUAL— IFICA— TIONS?
HE HAS TWO QUALIFICATIONS: HE'S UNEMPLOYED AND HE'S A GOLF BUDDY.
I RECOMMEND FIRING THE WHISTLEBLOWER AND PLAYING NINE BEFORE IT GETS DARK.
Dilbert.com DilbertCartoonist@gmail.com
© 2009 Scott Adams, Inc./Dist. by UFS, Inc.

DOD WHISTLEBLOWER REPRISAL MISSION

- Conduct / oversight investigations of:
  - Whistleblower Reprisal (Final approval authority)
  - Improper MHE referrals of Military members
- Establish and maintain Whistleblower Protection policy for:
  - Military
  - Non-Appropriated Fund Instrumentality (NAFI) Employees
  - Appropriated Fund Employees
  - Defense Contractor Employees
- Coordinate with the Intelligence Community IG on protections for civilian employees of the Intelligence Community
- Develop implementing directives
- Train Service and DoD personnel
- Monitor Whistleblower trends

CATEGORIES OF PROTECTED EMPLOYEES

(STATUTES AND DOD DIRECTIVES)

- **Whistleblower Reprisal**
  - Military Members (DoD IG, Services, Components)
    - *10 U.S.C. 1034, DoDD 7050.06*
  - Non-Appropriated Fund Employees (DoD IG)
    - *10 U.S.C. 1587, DoDD 1401.03*
  - Appropriated Fund Employees (DoD, OSC)
    - *5 U.S.C. 2302, DoDD 5106.01*
  - Defense Contractor Employees (DoD IG)
    - *10 U.S.C. 2409, FAR Subpart 3.9*
  - Intel Community Employees (DoD, NSA, DIA, NGA, and NRO)
    - *PPD-19, DTM 13-008, ICWPA*
- **Improper Mental Health Referrals (DoD, Services, Components)**
    - *DoDD 6490.1, DoDI 6490.4*

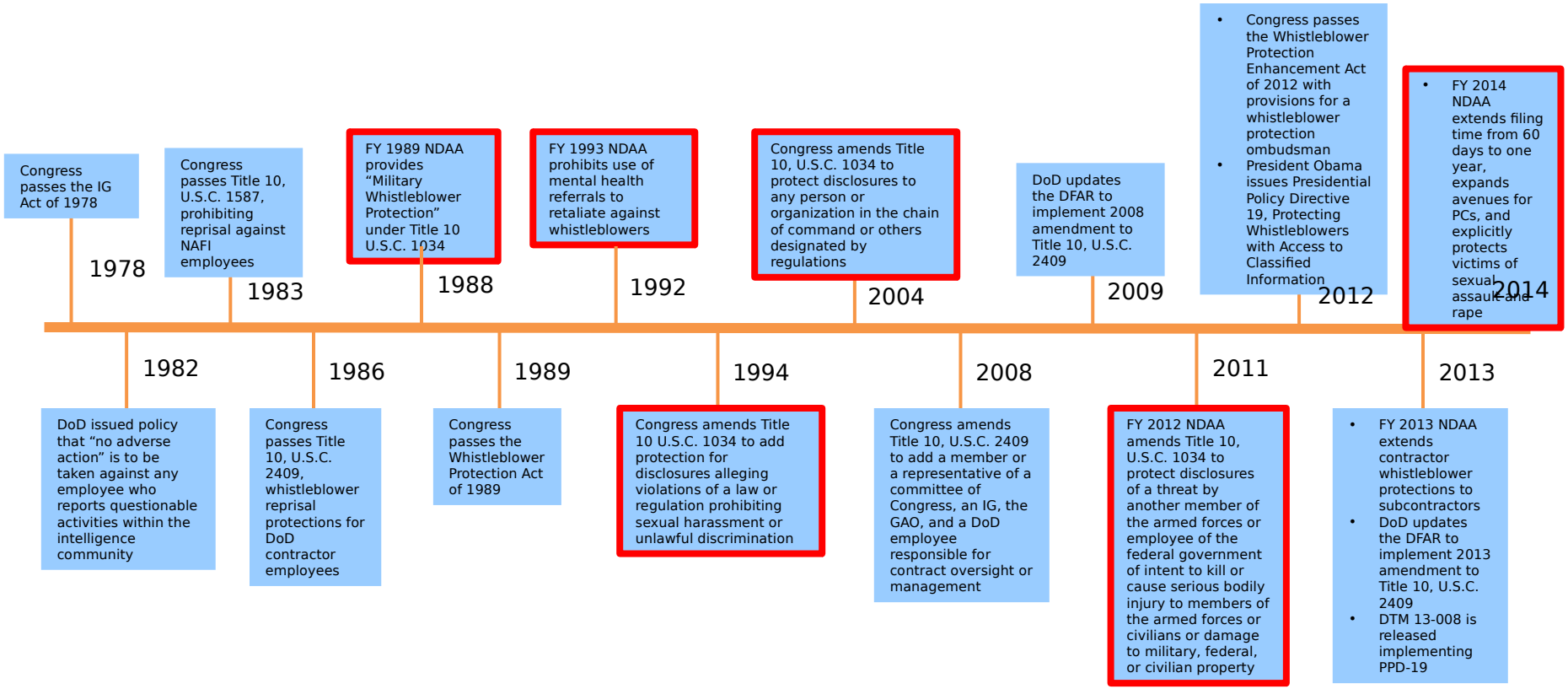
WHISTLEBLOWER PROTECTION - A DYNAMIC HISTORY

Ernie Fitzgerald

Congresswoman Barbara Boxer

Col James Burton

DEVELOPMENT OF THE LAW


1978
Congress passes the IG Act of 1978
1982
DoD issued policy that "no adverse action" is to be taken against any employee who reports questionable activities within the intelligence community
1983
Congress passes Title 10, U.S.C. 1587, prohibiting reprisal against NAFI employees
1986
Congress passes Title 10, U.S.C. 2409, whistleblower reprisal protections for DoD contractor employees
1988
FY 1989 NDAA provides "Military Whistleblower Protection" under Title 10 U.S.C. 1034
1989
Congress passes the Whistleblower Protection Act of 1989
1992
FY 1993 NDAA prohibits use of mental health referrals to retaliate against whistleblowers
1994
Congress amends Title 10 U.S.C. 1034 to add protection for disclosures alleging violations of a law or regulation prohibiting sexual harassment or unlawful discrimination
2004
Congress amends Title 10, U.S.C. 1034 to protect disclosures to any person or organization in the chain of command or others designated by regulations
2008
Congress amends Title 10, U.S.C. 2409 to add a member or a representative of a committee of Congress, an IG, the GAO, and a DoD employee responsible for contract oversight or management
2009
DoD updates the DFAR to implement 2008 amendment to Title 10, U.S.C. 2409
2011
FY 2012 NDAA amends Title 10, U.S.C. 1034 to protect disclosures of a threat by another member of the armed forces or employee of the federal government of intent to kill or cause serious bodily injury to members of the armed forces or civilians or damage to military, federal, or civilian property
2012
• Congress passes the Whistleblower Protection Enhancement Act of 2012 with provisions for a whistleblower protection ombudsman
• President Obama issues Presidential Policy Directive 19, Protecting Whistleblowers with Access to Classified Information
2013
• FY 2013 NDAA extends contractor whistleblower protections to subcontractors
• DoD updates the DFAR to implement 2013 amendment to Title 10, U.S.C. 2409
• DTM 13-008 is released implementing PPD-19
2014
• FY 2014 NDAA extends filing time from 60 days to one year, expands avenues for PCs, and explicitly protects victims of sexual assault and rape
Statutory Changes Impacting Service Members

THE LAW

- The Military Whistleblower Protection Act – Oct 1998
  - 10 USC 1034 - Protected Communication; prohibition of retaliatory personnel actions
- Abuses impact mission accomplishment
- Ensure grievance channels remain open
- Directs IG ownership
- Applies to military members in Title 10 Status
  - Civilians, NAFI employees, and Contractors are covered by other federal statutes

RETALIATORY ACTIONS

- **Restriction:** May not restrict a service member from communicating with a Member of Congress or an IG
- **Retaliation:** IAW SECNAVINST 5370. 7D, retaliation is defined as one of the following actions when taken against a service member because that member reported, either formally or informally, a criminal offense
  - **Reprisal**: Taking or threatening to take an unfavorable or adverse personnel action, or withholding or threatening to withhold a favorable personnel action
  - **Other:**
    - ***Ostracism:*** *the exclusion from social acceptance, privilege, or friendship with intent to discourage reporting of a criminal offense or otherwise discourage the due administration of justice*
    - ***Maltreatment:*** *treatment by peers or by other persons, that, when viewed objectively under all the circumstances, is abusive or otherwise unwarranted, unjustified, and unnecessary for any lawful purpose, that is done with intent to discourage reporting of a criminal offense or otherwise discourage the due administration of justice, and that results in physical or mental harm or suffering, or reasonably could have caused physical or mental harm or*

DEFINITIONS ASSOCIATED WITH RETALIATION

- Gross Mismanagement: A management action or inaction that creates a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission more than de minimis wrongdoing, simple negligence, or merely debatable actions
- Gross Waste of Funds: A more than debatable expenditure that is significantly out of proportion to the benefit reasonably expected to accrue to the government
- Abuse of Authority: An arbitrary or capricious exercise of power by a federal official or employee that adversely affects the rights of any person, or that results in personal gain, or advantage to himself or to preferred other persons

DEFINITIONS ASSOCIATED WITH RETALIATION

Substantial and specific danger to public health or safety

- Substantial and specific—
  - *Must involve particular person, place or thing*
  - *Not a negligible or remote or ill-defined peril*
- "Public" doesn't have to be the general public
  - *Can be a limited number of personnel*

- Responsible Management Official
  - The official(s) who influenced or recommended to the deciding official that he/she take, withhold, or threaten the action
  - The official who decided to take, withhold, or threaten the personnel action, and any other official who approved, reviewed, or endorsed the action

RESTRICTION

- Restriction (Title 10, Section 1034a)
  - No person may restrict a member of the armed forces in communicating with a Member of Congress or an IG
- Commanders
  - May encourage or order members to report wrongdoing to the chain of command
  - May not restrict a member from going to a Member of Congress or an IG
  - Must avoid creating a “chilling effect” where members are afraid to report wrongdoing due to perceived threats
- CIG Role: Open a case in CMS and refer to IGMC. This is an IGMC issue and cannot be referred to command

RETALIATION (REPRISAL) - DEFINED

- Reprisal (Title 10, Section 1034b)
  - No person may take (or threaten to take) an unfavorable personnel action, or withhold (or threaten to withhold) a favorable personnel action, as a reprisal against a member of the armed forces for making, preparing, or being perceived as making or preparing a protected communication
  - This is an IGMC issue and cannot be referred to command – it must stay in IGMC channels for investigative actions

RETALIATION (REPRISAL)– ELEMENTS

- **Protected communication (PC)**
- Personnel action
- Responsible Management Official (RMO) knowledge of the PC
- Apparent linkage between the PC and the personnel action

PROTECTED COMMUNICATION

- A lawful communication was made to an IG or a Member of Congress

- That communication is protected

PROTECTED COMMUNICATION (CONT)

IF

The communication was made to

- DoD audit, inspection, investigation, or law enforcement organization
- Any person or organization in the *chain of command*
- A court-martial proceeding
- Any other person or organization designated pursuant to regulations or other established administrative procedures to receive PCs *concerning…*

PROTECTED COMMUNICATION (CONT)

AND

- …Any communication which <u>the member reasonably believes</u> evidences:
  - A violation of law or regulation (including rape, sexual assault, other sexual misconduct, sexual harassment, or unlawful discrimination)
  - <u>Gross</u> mismanagement or <u>gross</u> waste of funds
  - An abuse of authority
  - A <u>substantial</u> and specific danger to public health or safety, or
  - A threat by another member of the armed forces or employee of the Federal Government that indicates a determination or intent to kill or cause serious bodily injury to members of the armed forces or civilians or damage to military, Federal, or civilian property

THEN

- That communication is protected
  - One does not need to be the victim of the crime reported to make a PC

PROTECTED COMMUNICATION (CONT)

- The communication was testimony or was made when participating in or assisting an investigation or proceeding related to a PC, or filing, causing to be filed, participating in, or otherwise assisting in an action brought under this section (10 USC 1034)

- That communication/action is protected

PROTECTED COMMUNICATION

Protections will not be excluded because

- The communication was made to one or more of the alleged wrongdoers
- The information had already been revealed
- Of the member's motive in making the communication
- The communication was not made in writing
- The member made the communication while off duty
- The communication was made during the normal course of duties.

PROTECTED COMMUNICATION

For each PC you must determine

- When was it made?
- To whom was it made?
- What was the subject of the complaint?
- Disposition of the issue identified in the PC?

RETALIATION (REPRISAL) – ELEMENTS

- Protected communication (PC)
- **Personnel action**
- Responsible Management Official (RMO) knowledge of the PC
- Apparent linkage between the PC and the personnel action

PERSONNEL ACTION

Any action taken on a member of the Armed Forces that affects, or has the potential to affect, that military member's current position or career

(DoDD 7050.06, E2.8)

PERSONNEL ACTIONS

Personnel actions include

- Denial / delay of promotions
- Disciplinary or other corrective action
- Fitness Reports / Performance Evaluations
- Transfer or reassignment (or denial of)
- Decisions affecting
  - Pay
  - Benefits
  - Awards
  - Training
  - TAD

PERSONNEL ACTIONS (CONT)

- Referral for a mental health evaluation
- Any other significant change in duties or responsibilities inconsistent with military member's grade or a threat to make such a change
- Revocation/Suspension of
  - access to classified material
  - authorization to carry a weapon
  - flying status
  - special certifications

RETALIATION (REPRISAL) – ELEMENTS

- Protected communication (PC)
- Personnel action
- **Responsible Management Official (RMO) knowledge of the PC**
- Apparent linkage between the PC and the personnel action

RESPONSIBLE MANAGEMENT OFFICIAL KNOWLEDGE

Responsible Management Official (RMO)

- Influenced or recommended the action be taken
- Made the decision to take the action
- Approved, reviewed, or endorsed the action

Knowledge

- Personally receiving the protected communication
- Hearing rumors about the protected communication
- Suspicion or belief that the complainant may have made a protected communication

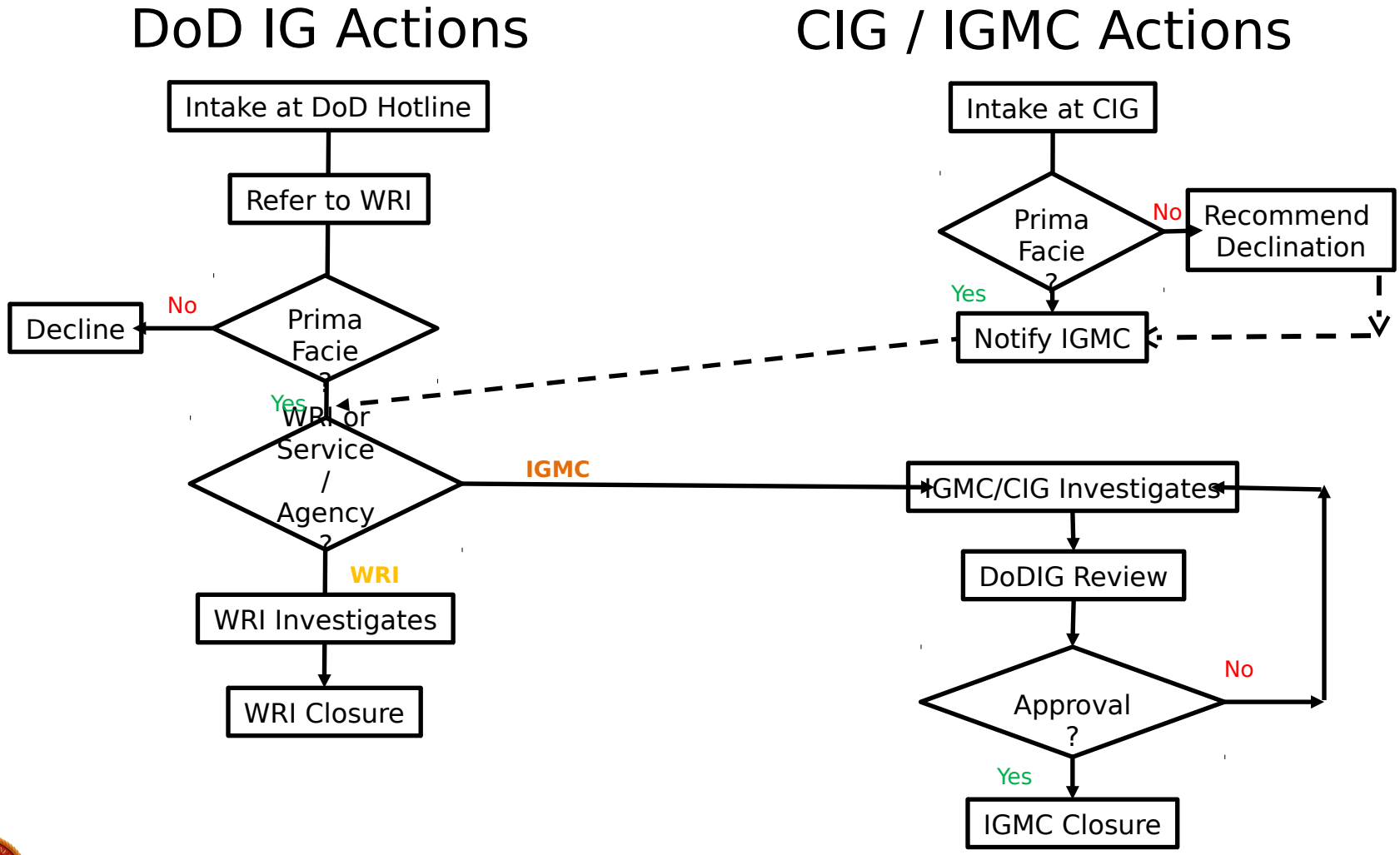
RETALIATION (REPRISAL) – ELEMENTS

- Protected communication (PC)
- Personnel action
- Responsible Management Official (RMO) knowledge of the PC
- **Apparent linkage between the PC and the personnel action**

LINKAGE

Would the **PA** have occurred if there was no **PC**?

MILITARY RETALIATION (REPRISAL) CASE FLOW (DODIG/IGMC/CIG)



CIG NOTIFICATION REQUIREMENTS

Step 1: Open a case in CMS and notify IGMC

Step 2: Conduct initial complaint analysis

- Clarify if complainant is alleging reprisal or something else
- Identify and address other command issues

IGMC will notify DoD IG within 10 working
ys o

TIMELINESS

- Service IGs may dismiss allegations based on timeliness
  - For personnel actions taken before 26 Dec 13, complainants had 60 days to file
  - For personnel actions taken on or after 26 Dec 13, complainants have **one year** from when they learn of the personnel action to file a complaint
- Service IGs may consider cases that exceed the time if
  - Compelling reasons for delay exist
  - Strength of evidence is overwhelming
- **NO LIMIT FOR RESTRICTION**

OTHER RETALIATION (OSTRACISM & MALTREATMENT)

- Intake
  - Via DoDIG and IGMC Hotlines
  - CMG or VLC
  - CIG Role: Same as Reprisal Retaliation
- Analysis
  - CIG Role: Same as Reprisal Retaliation
  - MWR Analysis worksheet
- Action
  - Case dependent, IGMC will task down to the command as a DoD “Action Tasker”
- Response
  - HCR due within 90 Days

BOTTOM LINE FOR RETALIATION

- It is against the law
- The complainant doesn't have to say reprisal for it to be reprisal; other words often used include retribution and retaliation
- Retaliation investigations are different from other admin investigations in that analyzing the motive is the key to the case

BREAK……

COMPLAINT ANALYSIS – (CIG)

- Determine prima facie (Protected Communication [PC] followed by personnel action taken/withheld)
- *Based primarily on documentation*
- Incoming complaint
- Personnel record
- Previous inquiries or investigations
- ***Interview the Complainant!!!***
- *Do not interview Responsible Management Officials (RMOs)*
- Look for obvious reasons actions not based on PC
  - Timing not right
  - Policy requiring the Personnel Action
- *Gather information*

  Complainant interview
  Copy of the PC(s)/PA(s)
  Chronology of events
  Readily available documentation
  Witness information

THE 4 QUESTIONS OF RETALIATION (REPRISAL)

1. Protected Communication?

2. Personnel Action?

3. RMO Knowledge?

4. Reprisal or Independent Basis?

RETALIATION (REPRISAL) - QUESTION 1

1. Did the military member make or prepare to make or be perceived as making or preparing a communication protected by statute?

   - To whom was the disclosure made?
   - What was disclosed?
   - When was the disclosure made?
   - Did a third party make the disclosure on behalf of the complainant?

RETALIATION (REPRISAL) – QUESTION 2

2. Was an unfavorable personnel action taken or threatened, or was a favorable action withheld or threatened to be withheld following the protected communication?

- What was the personnel action?
- When was it taken, withheld, or threatened?
- Identify all RMOs who:
  - *Influenced the decision to take action*
  - *Made the decision to take action*
  - *Took the action*
  - *Approved, reviewed, or endorsed the action*

RETALIATION (REPRISAL) – QUESTION 3

3. *Did the official(s) responsible for taking, withholding, or threatening the personnel action know about the protected communication?*

- Determine if any RMO knew, suspected, believed, or heard rumors that the complainant made or prepared to make a protected communication

- Determine when the RMO first suspected, believed, heard, or learned that the complainant made or prepared a protected communication

RMO KNOWLEDGE

RMO knowledge can be considered “yes” if they:

- Personally received the PC
- Heard rumors about the PC
- Suspected or believed the complainant made a PC (even if not true)

Notes:

- Precise knowledge of PC content is not necessary
- Simply being aware PC occurred (regardless of the subject or content) is sufficient

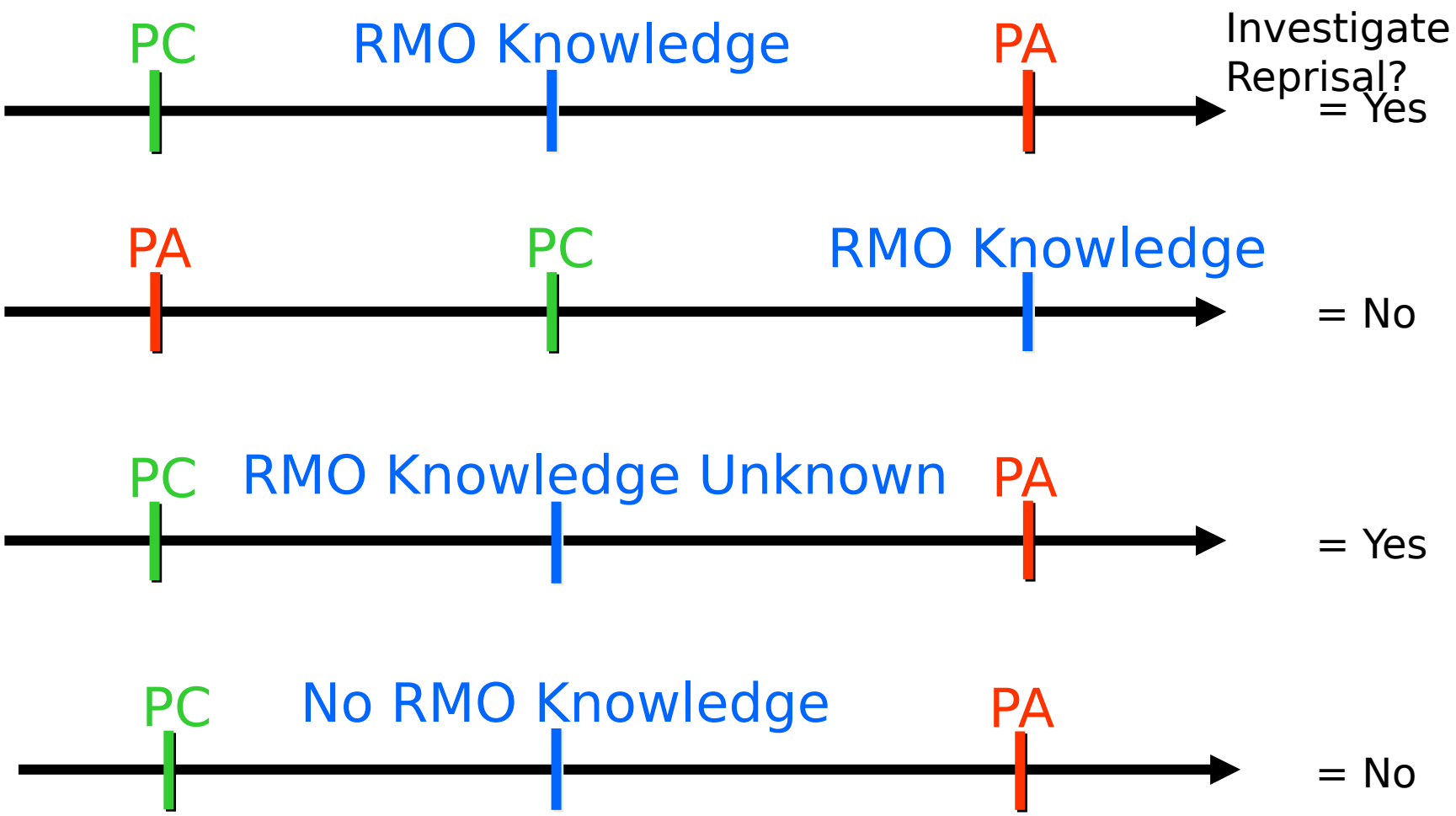
RMO ACTIONS

- What factors did the RMO(s) consider?
  - *It's incumbent on the RMO(s) to explain*
- Why at that particular time?
- Inconsistencies between the evidence and RMO(s) testimony?
- Bias against complainant "going outside the chain of command?"

DOUBT

If there is any doubt or uncertainty whether the RMO knew about the PC -- then give the complainant the benefit of the doubt, and proceed.

TO INVESTIGATE OR NOT…?



RETALIATION (REPRISAL) – QUESTION 4

4. Does the evidence establish that the personnel action would have been taken, withheld, or threatened if the protected communication had not been made?

- Consider five variables
  - *Reason*
  - *Timing between the PC and personnel action*
  - *Motivation*
  - *Animus*
  - *Consistency*
- IGMC will determine

ANALYZING THE EVIDENCE

- **Reason**
  - Why did the RMO take (or withhold) the action?
- **Timing between the PC and personnel action**
  - Less time – higher probability of reprisal
- **Motivation**
  - Did the RMO(s) suffer embarrassment or negative consequences because of the PC?
- **Animus**
  - Has the RMO(s) expressed animosity towards the complainant for making the PC or for the idea of anyone making a PC?
- **Consistency**
  - Were other similar problems with similarly-situated individuals handled in a similar manner?

WHAT NOW?

Answer the following:

"Make or prepare to make a PC?"

"PA taken or threatened?"

"RMO(s) knowledge of the PC ?" If there is any doubt, give the complainant the benefit.

If any NO, Complete a MWR Analysis Worksheet with what the Complainant claims are the

a. PC(s)

b. PA (s)

c. RMO (s)

IGMC will decline

WHAT NOW?

If the answers are - YES, YES, YES….

Complete a MWR Analysis Worksheet

a. Complainant Information

b. PC(s)

c. PA (s)

d. RMO (s)

IGMC will investigate

EXAMPLE OF CIG MWR MFR (PART I)

DEPARTMENT OF THE NAVY
DEPUTY NAVAL INSPECTOR GENERAL FOR MARINE CORPS MATTERS/
INSPECTOR GENERAL OF THE MARINE CORPS
701 S COURTHOUSE ROAD
ARLINGTON, VA 22204

5000
IGA
[DATE

From: Command Inspector General, (Command Name)
To: Inspector General of the Marine Corps

Subj: MILITARY REPRISAL COMPLAINT ANALYSIS CASE #XXXXXX

Ref: (a) DoD Directive 7050.6, 17 April 2015, Military Whistleblower Protection
(b) SECNAVISNT 5370.7D, 4 December 2014, Military Whistleblower Reprisal Protection

Encl: (1) Original Complaint dtd
(2) Protected Communication dtd (e.g., Request Mast, IG Complaint, CONGRINT)
(3) Personnel Action dtd (e.g., 6105, Fitness

EXAMPLE OF CIG MWR MFR (PART II)

On DD Month YYYY, the Command Inspector General received a method (walk-in/e-mail, etc) complaint. Name of CIG conducted an initial analysis and determined that the complaint involved possible military whistleblower reprisal. In accordance with Title 10 U.S.C., Section 1034 (Military Whistleblower Protection) and References (a) and (b), the CIG NAME provides the following:

a. Complainant Information: Rank FName, LNAME, USMC.

b. Protected Communication: Briefly explain the Protecte Communication (PC) including the following information:

Did the military member make or prepare to make a communication protected by statute? (Yes or No)

Who was the PC made to?

What type of Protected Communication was made (IG/EEO/SAP

EXAMPLE OF CIG MWR MFR (PART III)

was a favorable action withheld or threatened to be withheld AFTER the protected communication was made? (Yes or No)

What was the PA?

When was it taken, withheld, or threatened?

Did the Unfavorable PA negatively impact the Marine's career?

d. Responsible Management Officials:

(1) Rank FName LName, Billet, Unit, Location

(2) Rank FName LName, Billet, Unit, Location

INVESTIGATING REPRISAL (IGMC)

- If complaint meets statute, then investigate
- If not, decline – DoDIG must approve
- Utilize complaint intake as launching point
- Examine 4 main elements to determine if reprisal occurred
- Testimony based (complainant, *witnesses, RMOs, and subject matter experts)*
- Determine if facts support a nexus between the protected communication and the personnel action
- IGMC must forward to DoDIG WRI for final approval
- Delays in completion require:
  - Investigations should be completed within 180 days of filing
  - Must notify SecDef, Secretary of military department concerned, and complainant of any delay, the cause of

REPORTING REQUIREMENTS

- If the investigation/inquiry is going to exceed 180 days, must notify the complainant of this fact, explain why, and give an estimate for completion
  - *Copies of this letter must be sent to SecDef, the Secretary of the Navy and to DoDIG*
- Upon approval of the investigation by DoDIG, submit a report on the findings to the complainant, the SecDef, and the Secretary of the Navy of the findings.
- IGMC will provide DoDIG a copy of the notification to the complainant
- Notify DoDIG of any command actions or remedial actions taken as a result of the investigation
- The Secretary of the Navy must ensure the command took action or notify the SecDef why no action was taken

MILITARY WHISTLEBLOWER "PROTECTIONS"

- IG DoD has oversight responsibility for all DoD military reprisal complaints

- Service Members have the right to appeal to the Secretary of Defense
  - Must exercise all appeal channels within their Service Board of Corrections
  - Must file their appeal within 90 days of the final decision by the Service

SUMMARY

- Overview of DoD Military Reprisal Program
  - History
  - Who’s covered?
  - What are the guiding statutes and regulations?
  - Investigative process
  - Elements of Reprisal for investigations
  - Reporting Requirements

QUESTIONS?